BRITISH COLUMBIA

Ministry of Attorney General
Corrections Branch

MANAGEMENT REPORT

Conditional Sentencing
Pre and Post *R. v. Proulx* Decision

Research Section
Strategic Planning & Corporate Programs Division
November 2000

Report No. 2000: 02

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Protecting Communities, Assisting Families

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Introduction

This paper examines how conditional sentences are being applied in British Columbia by contrasting the use of conditional sentences with other sentencing options and by profiling the offenders receiving conditional sentences. These profiles are also examined to see if they have been affected by the Supreme Court rulings on conditional sentencing (*R. v. Proulx, R. v. Bunn, R. v. L.F.W., R. v. R.A.R., and R. v. R.N.S.*)

In September 1996, conditional sentences were introduced in legislation through Bill C-41, which provided judges with a sentencing alternative to custody. Conditional sentences allow less serious offenders who are not a danger to the public to serve their sentences in the community rather than be incarcerated. They are intended to be more punitive than probation orders. Conditional sentences impose greater restrictions on the offender's liberty than probation (two of the five compulsory conditions of a conditional sentence are optional in a probation order). Conditional sentences are also supposed to achieve rehabilitative objectives and judges can order the offender to attend a treatment program without the offender's consent.

Case law has provided limited guidance to justice professionals in the application and administration of conditional sentences. However, on January 31, 2000, the Supreme Court of Canada ruled on five conditional sentencing cases and the Court's unanimous decision in *R. v. Proulx* from the Manitoba Court of Appeal sets out the guidelines for interpreting the conditional sentencing provisions.

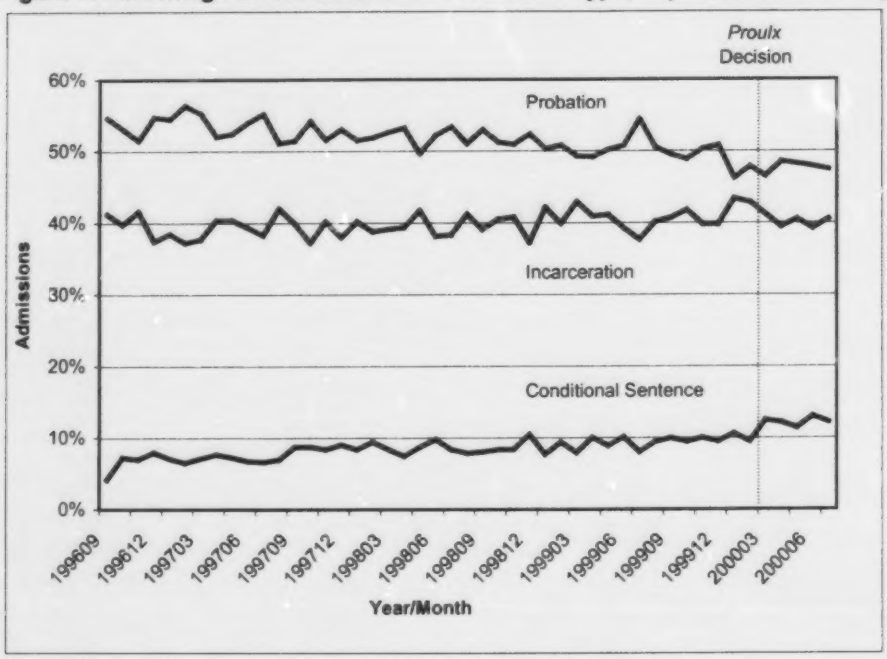
The *Proulx* decision affirms that the purpose of conditional sentencing is to reduce reliance on incarceration and increase the use of restorative justice principles. It was also stated that conditional sentences can provide significant denunciation and deterrence. This sentencing option is preferable to incarceration when punitive and rehabilitative objectives can be achieved. It is expected that the Supreme Court's analysis of the interpretation and application of conditional sentencing will affect sentencing practices.

Growth of Conditional Sentences

Since the inception of conditional sentencing (September, 1996), there have been 8,729 conditional sentence orders administered in B.C., with an average of 188 conditional sentence admissions to BC Corrections monthly. The average number of monthly admissions to conditional sentences increased from 179 during the pre-*Proulx* period to 248 during the post-*Proulx* period. An examination of the growth in these admissions as a percentage of each order type indicates that the judiciary in B.C. initially selected the conditional sentence option in about 8% of cases during the first year (see Figure 1). The use of conditional sentencing stabilized at around 10% in the years preceding *Proulx*. There appears to be an

increase in the use of this option since the *Proulx* decision with conditional sentences accounting for approximately 12% of admissions to BC Corrections.

Figure 1: Percentage of Admissions for Each Order Type, September 1996 – July 2000



The data suggests that the use of conditional sentences has affected the proportion of probation orders more than it has admissions to custody. This suggests that the conditional sentencing legislation may not be having the desired impact of reducing reliance on incarceration in sentencing.

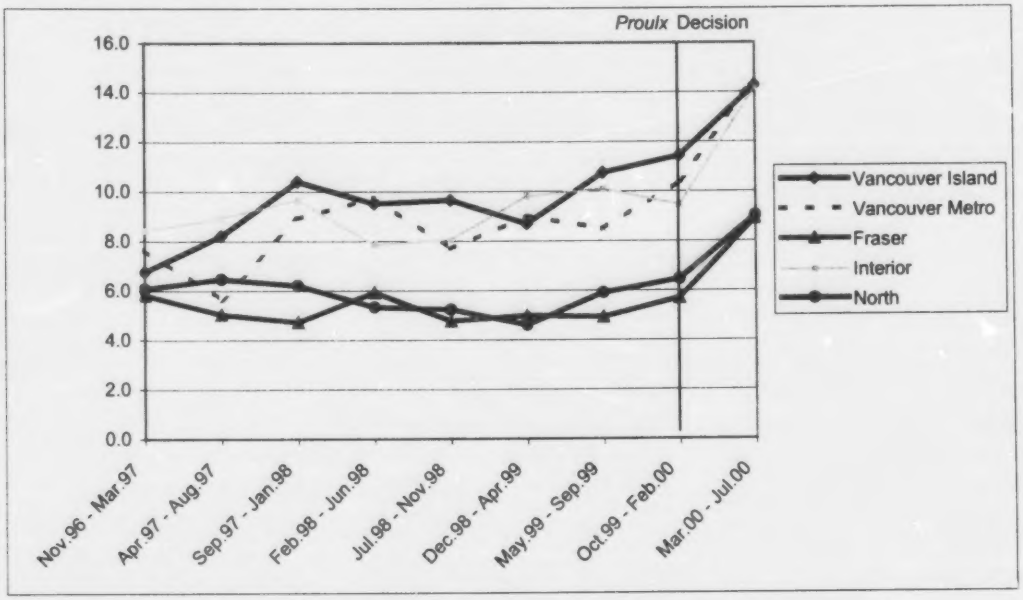
The *Proulx* decision cautions sentencing judges against "widening the net" by imposing conditional sentences on offenders who would have received a non-custodial disposition (see *R. v. Proulx*, 2000 SCC 5, paragraph 56). According to *Proulx*, if probationary measures or a penitentiary term are appropriate, a conditional sentence should not be imposed (ibid., paragraph 58).

Regional Differences

Increased use of conditional sentences is occurring in every region of B.C., especially since the *Proulx* decision (see Figure 2 and Table 1). Statements in the *Proulx* decision emphasizing that conditional sentences should be used to reduce incarceration, as intended by Parliament, may have encouraged judges to use this sentencing option more often.

Figure 2 indicates that judges in the Fraser Valley and the North court regions are less likely to impose conditional sentences than other regions in the province. While regional differences are evident in the results of this interaction, the reasons for the differences are not.

Figure 2: Conditional Sentence Admissions as a Percentage of All Correctional Sentenced Admissions by Region, November 1996 – July 2000*



* See Table 1 for data for the first two months of conditional sentencing and out-of-province admissions.

Table 1: Conditional Sentence Admissions as a Percentage of All Correctional Sentenced Admissions by Region, September 1996 – July 2000

Court Region	96/09 - 96/10	96/11 - 97/03	97/04 - 97/08	97/08 - 98/01	98/02 - 98/06	98/07 - 98/11	98/12 - 99/04	99/05 - 99/09	99/10 - 00/02	00/03 - 00/07	Since inception
Vancouver Island	7.4%	6.7%	8.2%	10.4%	9.5%	9.6%	8.7%	10.7%	11.4%	14.3%	10.7%
Vancouver Metro	7.7%	7.6%	5.6%	8.9%	9.8%	7.7%	9.0%	8.5%	10.4%	14.5%	10.3%
Fraser	3.5%	5.8%	5.0%	4.7%	5.9%	4.8%	5.0%	4.9%	5.7%	8.9%	6.5%
Interior	6.3%	8.4%	8.9%	9.7%	7.8%	8.1%	9.8%	10.1%	9.5%	14.2%	9.9%
North	3.3%	6.1%	6.4%	6.2%	5.3%	5.2%	4.6%	5.9%	6.4%	9.0%	6.4%
Outside B.C.	3.9%	8.5%	9.8%	6.9%	12.1%	12.4%	11.6%	9.5%	13.0%	11.5%	10.3%

Profile of Offenders

The gender, age and race profile of offenders given conditional sentences is similar across the pre and post-*Proulx* periods (September 1996 – January 2000 and February 2000 – July 2000 respectively) and does not differ substantially from the profile of offenders receiving probation or incarceration (see Table 2). Almost half (48%) of offenders receiving conditional sentences are white males between the ages of 20 and 44.

Table 2: Gender, Age and Race of Offenders by Order Type, September 1996 – July 2000

Gender	Conditional Sentences	Percent	Probation Sentences	Percent	Incarceration Sentences	Percent
Female	1420	16.3%	7864	15.3%	3080	7.7%
Male	7307	83.7%	43591	84.7%	36872	92.3%
Unknown	2	0.0%	7	0.0%	2	0.0%
Age Group						
1-17*	6	0.1%	32	0.1%	29	0.1%
18-19	465	5.3%	5385	10.5%	2502	6.3%
20-21	615	7.0%	4506	8.8%	3351	8.4%
22-24	911	10.4%	5150	10.0%	4507	11.3%
25-29	1512	17.3%	8307	16.1%	7609	19.0%
30-34	1533	17.6%	8452	16.4%	7343	18.4%
35-39	1409	16.1%	7984	15.5%	6360	15.9%
40-44	967	11.1%	5329	10.4%	3977	10.0%
45-49	572	6.6%	3093	6.0%	2149	5.4%
50+	739	8.5%	3224	6.3%	2127	5.3%
Race						
Aboriginal	1404	16.1%	8175	15.9%	7908	19.8%
Black	105	1.2%	724	1.4%	704	1.8%
Caucasian	6245	71.5%	36654	71.2%	28580	71.5%
East Indian	155	1.8%	1349	2.6%	661	1.7%
Hispanic	18	0.2%	154	0.3%	257	0.6%
Native Indian non-B.C.	1	0.0%	4	0.0%	0	0.0%
Oriental	382	4.4%	1548	3.0%	1185	3.0%
Unknown	419	4.8%	2854	5.5%	659	1.6%
Total	**8729**	**100.0%**	**51462**	**100.0%**	**39954**	**100.0%**

*Youth sentenced to adult court

Conditional Sentence Orders by Offence Category

Conditional sentences are administered for a variety of offence types in B.C., but are most commonly given to offenders committing property crimes, drug offences and violent crimes (see Table 3). Based on first admission for a conditional sentence in each period (pre and post-*Proulx*) and information on the most serious offence, offenders were categorized into the offence types listed in Table 3. There was an increase in the average monthly admissions for every category of offence. Drug crimes show the largest percentage change since *Proulx*.

Table 3: Average Monthly Conditional Sentence Admissions by Offence Category, September 1996 – July 2000

Offence Category	Pre-*Proulx* (1996/09 – 2000/01)	Post-*Proulx* (2000/02 – 2000/07)	Percentage Change
Drugs	25.5	60.8	139%
Person Crimes	7.2	11.8	64%
Property	56.5	86.5	53%
Violent	29.5	40.5	37%
Sex	9.7	13.2	36%
Breach	7.5	8.8	18%
Other	20.3	22.5	11%

Drug offences increased from 25.5 average monthly admissions in the pre-*Proulx* period to 60.8 since the *Proulx* ruling. Trafficking or cultivation was the most serious offence for more than 90% of drug offenders given a conditional sentence. Many offenders involved in selling and producing drugs may also be addicted to drugs and would be good candidates for conditional sentences, according to the following statements from the *Proulx* decision:

> *Drug addicts sentenced to incarceration without addressing addiction will not likely lead to rehabilitation but rather increase their exposure to the influence of chronic, harmful drug users and reinforce their attachment to the drug culture. House arrest (which should be the norm in a conditional sentence) may have a rehabilitative effect insofar as it prevents the offender from engaging in habitual anti-social associations and promotes pro-social behaviors* (*Proulx*, ibid., paragraph 110).

These statements may have influenced judicial sentencing practices, resulting in a substantial increase in conditional sentence admissions for drug offences. However, it should be noted that many drug addicts commit other offences such as property crime and prostitution and would not be represented in the drug offence category.

The number of sex and violent offenders receiving conditional sentences is also increasing. The Attorney General of Canada, the Attorney General for Ontario and appellate court decisions support the view that conditional sentences would rarely be appropriate for offences such as:

- Sex offences against children
- Aggravated sexual assault
- Manslaughter
- Serious fraud or theft
- Serious morality offences
- Impaired or dangerous driving causing death or bodily harm, and
- Trafficking or possession of certain narcotics.

(*Proulx*, ibid., paragraph 80)

However, the *Proulx* decision outlined that there is no presumption for or against the use of conditional sentences for any particular offences, nor should there be, because such presumptions would introduce unwarranted rigidity into sentencing.

Three of the other Supreme Court rulings on conditional sentences involved sex offenders.[1] These rulings emphasize that judges need to weigh the factors mitigating for and against a conditional sentence in each case. Although the decisions were not unanimous, the Supreme Court restored the term of incarceration in all three cases, arguing that the short conditional sentences did not provide sufficient denunciation to signify society's abhorrence for the acts committed. The average number of conditional sentence admissions for sex crimes has not decreased since the Supreme Court rulings, although these rulings may affect sentence length (i.e. result in longer conditional sentences for sex offences) rather than the absolute number of conditional sentences for sex offences.

Sentence Length

The average sentence length of conditional sentences in B.C. is approximately 200 days, which is similar to the pre and post-*Proulx* period and across all regions in B.C. (see Table 4). The average sentence length for conditional sentences varies considerably by offence type. They are consistently longer than provincial incarceration sentences[2] and shorter than probation sentences (see Table 5). Sex offences are the only exception, with conditional sentences being shorter on average than probation and incarceration sentences.

[1] In two of these cases (*R. v. R.A.R.* and *R. v. R.N.S.*), Crown appealed the Court of Appeal's decision to substitute a conditional sentence for a sentence of incarceration since the new legislation came into effect. The Supreme Court determined that the Court of Appeal erred in failing to give significant weight to the punitive objectives of denunciation and deterrence and appeals were allowed in these cases. There was dissension from some judges who argued that although the sentence appears lenient, it should not be interfered with, given the court's careful analysis of the sentencing principles and review of the evidence.

In the other sex offence case (*R. v. L.F.W.*), Crown appealed a 21-month conditional sentence and was seeking a 21-month term of incarceration. The Court of Appeal dismissed the appeal and Crown appealed to the Supreme Court. In this case, the appeal was dismissed and the Supreme Court judges were equally divided. Half the judges argued that the conditional sentence was within the acceptable range of sentences that could have been imposed in the circumstances, and the judge's reasons were thorough. The dissenting judges argued that the conditional sentence was a demonstrably unfit sentence and the conditional sentence should not stand. In all three cases, the offenders served their conditional sentence in full by the time it reached the Supreme Court and their sentences of incarceration were stayed.

[2] Making conditional sentences longer than a term of incarceration for the same type of offence recognizes their relative leniency and maintains the fundamental principle of proportionality as set out in Section 718.1 (*Proulx*, ibid., paragraphs 44 and 54).

Table 4: Average Conditional Sentence Length in Days by Court Region

Court Region	Pre *Proulx**	Post-*Proulx***
North	180	191
Interior	185	198
Vancouver Island	187	199
Vancouver Metro	210	205
Fraser	192	208
Outside B.C.	339	424

*Sept. 1996 – Jan. 2000 **Feb. 2000 – Jul. 2000

Table 5: Average Sentence Length in Days for Offences by Order Type, September 1996 – July 2000

	Average Sentence Length		
	Conditional Sentences	Probation	Incarceration
Breach	114	369	63
Drugs	198	373	109
Other	180	402	51
Other Person Crimes	222	524	117
Property	199	401	115
Sex	327	701	353
Violent	195	444	157
All offence types	**200**	**424**	**97**

Prior Correctional History

The *Proulx* ruling advises judges to consider the risk posed by an offender, and the gravity of damage that could result from a re-offence. This emphasis is preferred to considering the broader risk of providing insufficient general deterrence or undermining general respect for the law. Combined with the current offence, criminal record plays a key role in judicial assessments of the offender's risk to re-offend.[3] Table 7 shows the number of convictions prior to the offender's first admission to a conditional sentence in each period (pre and post-*Proulx*).

[3] Factors to consider when assessing the risk of re-offence (*Proulx*, ibid., paragraph 70): nature and circumstances of the offence:

- Profile (e.g. criminal record, occupation, lifestyle, family, mental state)
- Previous compliance with court orders
- Participation and conduct following the offence
- Relationship to victim
- Danger that interim release of the accused represents for the community.

Table 6: Prior Correctional History

Prior convictions	Pre-*Proulx*	Percent	Post-*Proulx*	Percent
None	2626	41.1%	592	40.4%
One	1034	16.2%	225	15.4%
2-4	1416	22.1%	317	21.6%
5-9	860	13.5%	211	14.4%
10+	458	7.2%	120	8.2%
Total	**6394**	**100.0%**	**1465**	**100.0%**

The majority of offenders receiving a conditional sentence in B.C. have no prior correctional history or only one prior offence (approximately 56% pre and post-*Proulx*). Another 22% of conditional sentences were given to offenders with two to four prior offences. Approximately 14% had five to nine prior convictions.

Chronic offenders (10 or more prior offences) constitute 7% of pre-*Proulx* conditional sentences. This has increased marginally to 8% of post-*Proulx* admissions. Approximately half of the chronic offenders received a conditional sentence for property crimes (56%) and another quarter for violent offences (10%), drug offences (9%), or breaches of court orders (8%).

Research on recidivism indicates that chronic offenders have a 75% chance of being re-convicted compared to only 39% for first-time offenders (see BC Corrections Branch, *Recidivism in the B.C. Offender Population*, November 2000). In addition, chronic offenders re-offend sooner than other recidivists, which suggests that this group is less likely to complete their conditional sentence. There is evidence to suggest that conditional sentences are completed by first-time offenders. Offenders with no prior criminal record breached none of the conditional sentence orders administered in Vancouver, Burnaby or Port Coquitlam during 1998 (North, *An Empirical Analysis of Conditional Sentencing in B.C.*, 2000, p.9).

Offender Risk Level

The Community Risk Needs Assessment (CRNA) is a rating form that allows case managers to record their appraisal of an offender's risk level and needs factors that relate to recidivism (see BC Corrections Branch, *CRNA Outcome Studies*, 2000). The risk profiles of offenders receiving conditional sentences, compared to other sentence types pre and post-*Proulx*, should provide a more comprehensive measure of the risk of recidivism posed by this population.

CRNA assessments were available for 43% of offenders serving a conditional sentence in B.C.[4] After examining the latest[5] CRNA completed during the offender's conditional sentence, it appears that the majority of these offenders are assessed at a low or medium risk level (83% pre and 79% post-*Proulx*). The percentage of high-risk offenders is 17% during the pre-*Proulx* period and 21% post-*Proulx*.

This small but significant increase in the CRNA ratings of conditional sentence offenders since the *Proulx* decision is apparent in the probation population (see Tables 8 and 9). This finding suggests that the general population of offenders in the community have higher risk levels than in the past or there is a trend toward higher ratings by assessors. This shift in CNRA risk levels is demonstrated in the Corrections Branch *Monthly Factbook Risk Needs Assessment Report*.

Table 7: CRNA Risk Levels for Conditional Sentence Offenders Pre and Post-*Proulx*

CRNA Risk Level	Pre-*Proulx**	Percent	Post-*Proulx***	Percent
Low	1271	46.1%	235	39.6%
Medium	1019	37.0%	235	39.6%
High	465	16.9%	123	20.7%
Total	**2755**	**100.0%**	**593**	**100.0%**

*Sept. 1996 – Jan. 2000 **Feb. 2000 – Jul. 2000

Table 8: CRNA Risk Levels for Probationers Pre and Post-*Proulx*

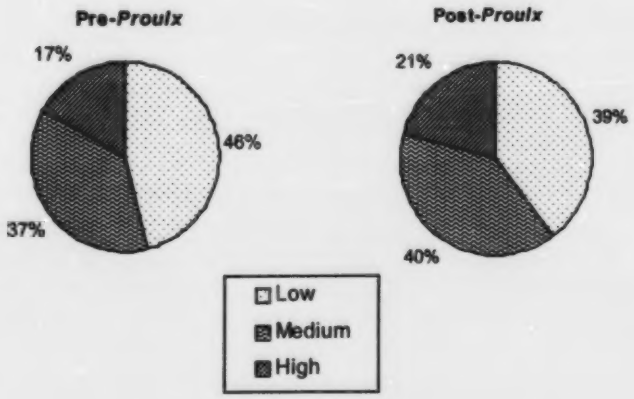
CRNA Risk Level	Pre *Proulx**	Percent	Post-*Proulx***	Percent
Low	12758	53.6%	957	48.3%
Medium	8244	34.6%	773	39.0%
High	2799	11.8%	250	12.6%
Total	**23801**	**100.0%**	**1980**	**100.0%**

*Sept. 1996 – Jan. 2000 **Feb. 2000 – Jul. 2000

[4] The completion rate is even smaller in the post-*Proulx* period (40%), presumably because there is a shorter timespan to complete one and because many offenders would have just started their conditional sentence and not yet been assessed.

[5] It is assumed that the latest CRNA's completed during the offender's sentence will be the most accurate profile of risk level because the assessor will have more time to get to know the offender's background and needs.

Figure 3: CRNA Risk Levels Pre and Post-*Proulx*



Risk levels are significantly higher for the conditional sentence population than for the probation population (see Table 10). This finding is expected because this new sentence option targets offenders who formerly would have gone into custody and are likely to have higher risk levels.[6] It is also possible that conditional sentences are being applied to higher risk offenders who would previously have received probation.[7]

Table 10: Mean CRNA Risk Levels* Pre and Post-*Proulx*

	Pre-*Proulx*	Post-*Proulx*
Conditional Sentence	1.70	1.81
Probation	1.57	1.65

*Low=1, Medium=2, High=3

[6] The CRNA is not completed for the population of offenders serving custodial sentences.
[7] The Corrections Branch will release the results of a research model that predicts the type of sentence an offender would have received in the absence of the conditional sentence option.

Given the recidivism rate among high-risk offenders (see BC Corrections Branch, *CRNA Outcome Studies*, 2000), there is concern that conditional sentences will actually increase levels of incarceration in Canada. According to *Proulx*, there should be a presumption that when an offender breaches a conditional sentence without reasonable excuse, the remainder of the sentence will be served in jail (*Proulx*, ibid., paragraph 17). Because conditional sentences are longer than jail terms on average, offenders who breach their conditional sentence near the beginning of their sentence would spend more time in prison than if they had originally received a jail term.

Without resources for supervision and services to support the treatment and rehabilitation of conditional sentence offenders, offenders are less likely to complete their sentences out of custody (North, *An Empirical Analysis of Conditional Sentencing in B.C.*, 2000). If programming can address the needs of offenders as identified by the CRNA, a reduction in their recidivism rate should be expected.

Conclusion

The *Proulx* judgment endorses the use of conditional sentences when appropriate and this may have influenced the judiciary in British Columbia to use this new sentencing option more often in all regions and for all types of offences. However, the *Proulx* guidelines for the application and interpretation of conditional sentencing do not appear to have had a substantial impact on the profile of offenders receiving conditional sentences. Conditional sentence length and prior correctional history show no notable differences since the *Proulx* decision. The increased risk levels observed for conditional sentence offenders since the *Proulx* decision are likely the result of other factors because the same trend is observed for the probation population.

Only five months have passed since the *Proulx* decision. Because it may take longer for this judgment to have an impact on conditional sentencing in B.C., the issues examined in this paper should be re-examined in the year 2001. Future analysis should examine the conditions of conditional sentences, the breach rate and incarceration rates.

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